

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

EZELL MOORE, JR.,

Plaintiff,

V.

HUNT, et al.,

## Defendants.

Case No. 1:20-cv-01020-EPG (PC)

**FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT THIS CASE BE  
DISMISSED, WITHOUT PREJUDICE,  
BECAUSE OF PLAINTIFF'S FAILURE  
TO PROSECUTE THIS CASE AND  
FAILURE TO COMPLY WITH A COURT  
ORDER**

**OBJECTIONS, IF ANY, DUE WITHIN  
FOURTEEN DAYS**

**ORDER DIRECTING CLERK TO ASSIGN  
DISTRICT JUDGE**

Ezell Moore, Jr. (“Plaintiff”), is a prisoner proceeding *pro se* in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Plaintiff filed the complaint commencing this action on July 23, 2020. (ECF No. 1). Plaintiff filed an application to proceed in forma pauperis (ECF No. 2), but it was not signed as required by Federal Rule of Civil Procedure 11(a) and Local Rule 131(b). Accordingly, on July 28, 2020, the Court gave Plaintiff forty-five days to either pay the filing fee or submit a completed and signed application to proceed in forma pauperis. (ECF No. 4). The Court warned Plaintiff that “[f]ailure to comply with this order will result in dismissal of this action.” (Id. at 1).

The forty-five-day deadline has expired, and Plaintiff has not paid the filing fee or filed

1 a completed and signed application to proceed in forma pauperis.<sup>1</sup> Accordingly, the Court will  
2 recommend that this case be dismissed, without prejudice, because of Plaintiff's failure to  
3 prosecute and failure to comply with a court order.

4 "In determining whether to dismiss a[n] [action] for failure to prosecute or failure to  
5 comply with a court order, the Court must weigh the following factors: (1) the public's interest  
6 in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of  
7 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the  
8 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d  
9 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

10 "The public's interest in expeditious resolution of litigation always favors dismissal."  
11 Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly,  
12 this factor weighs in favor of dismissal.

13 As to the Court's need to manage its docket, "[t]he trial judge is in the best position to  
14 determine whether the delay in a particular case interferes with docket management and the  
15 public interest.... It is incumbent upon the Court to manage its docket without being subject to  
16 routine noncompliance of litigants...." Id. Here, Plaintiff's failure to pay the filing fee or to file  
17 a completed and signed application to proceed in forma pauperis, despite being ordered to do so  
18 by the Court, is delaying this case and interfering with docket management. Therefore, the  
19 second factor weighs in favor of dismissal.

20 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in  
21 and of itself to warrant dismissal." Id. (citing Yourish, 191 F.3d at 991). However, "delay  
22 inherently increases the risk that witnesses' memories will fade and evidence will become  
23 stale," id. at 643, and it is Plaintiff's failure to comply with a court order and to prosecute this  
24 case that is causing delay. Therefore, the third factor weighs in favor of dismissal.

25 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
26 available to the Court which would constitute a satisfactory lesser sanction while protecting the  
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28 <sup>1</sup> Plaintiff also failed to respond to the Court's order regarding consent or decline of magistrate judge jurisdiction (ECF No. 3-1, p. 3).

1 Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff's  
2 incarceration and his failure to pay the filing fee, it appears that monetary sanctions are of little  
3 use. And, given the stage of these proceedings, the preclusion of evidence or witnesses is not  
4 available. Additionally, because the dismissal being considered in this case is without  
5 prejudice, the Court is stopping short of using the harshest possible sanction of dismissal with  
6 prejudice.

7 Finally, because public policy favors disposition on the merits, this factor weighs  
8 against dismissal. Id.

9 After weighing the factors, the Court finds that dismissal without prejudice is  
10 appropriate. Accordingly, the Court HEREBY RECOMMENDS that:

- 11 1. This case be dismissed, without prejudice, because of Plaintiff's failure to  
12 prosecute this case and failure to comply with a court order; and  
13 2. The Clerk of Court be directed to close this case.

14 These findings and recommendations will be submitted to the United States district  
15 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
16 fourteen (14) days after being served with these findings and recommendations, Plaintiff may  
17 file written objections with the Court. The document should be captioned "Objections to  
18 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file  
19 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.  
20 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394  
21 (9th Cir. 1991)).

22 Additionally, IT IS ORDERED that the Clerk of Court is directed to assign a district  
23 judge to this case.  
24 IT IS SO ORDERED.

25 Dated: September 25, 2020

26 /s/ *Eric P. Guay*  
27 UNITED STATES MAGISTRATE JUDGE  
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